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RACIAL DISCRIMINATION AND JUDICIAL INTEGRITY: A REPLY TO PROFESSOR WECHSLER *

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To the great and on-going public debate on the proper scope of judicial review, notable contributions have been forthcoming from two distinguished students of the Supreme Court who have, last year and this, delivered the annual Holmes Lecture at Harvard. The first of these contributions is Learned Hand's eloquent essay "The Bill of Rights."¹ The second, partly responsive to Judge Hand and partly building upon him, is Herbert Wechsler's characteristically provocative and thoughtful paper, "Toward Neutral Principles of Constitutional Law."² In insisting on neutral constitutional adjudication, Professor

* This Article was largely written during the past summer, when the writer was privileged to participate in a Seminar on Legal Sanctions in Desegregation Cases, conducted by the University of Wisconsin Law School, with the support of the Ford Foundation. The seminar dealt, at least tangentially, with a number of the problems considered here, and some of the thinking which underlies this essay was shaped by the provocative and friendly interchange among the members of the seminar: G. W. Foster, Jr., Professor of Law at the University of Wisconsin and skillful ringmaster of the seminar; Harry Ball, Professor of Sociology at Pomona; Paul Mishkin, Professor of Law at the University of Pennsylvania; Paul Sanders, Professor of Law at Vanderbilt; George Simpson, Professor of Anthropology and Sociology at Oberlin; and Melvin Tunin, Professor of Sociology at Princeton. This Article also draws upon extremely rewarding conversations with J. Willard Hurst and Samuel Mermin, Professors of Law at the University of Wisconsin, and with several of the writer's colleagues at Yale.

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¹ Printed in book form as HAND, *THE BILL OF RIGHTS* (1958) (hereinafter cited as *HAND*).

² Printed in the current issue of the *Harvard Law Review* at 73 *HARV. L. REV.* 1 (1959) (hereinafter cited as *Wechsler*).

Wechsler blueprints a sound theoretical structure of reasoned and dispassionate judicial review. But he singles out as prime examples of judicial unneutrality the major recent Supreme Court decisions in the field of race discrimination, culminating in the Court's consideration of segregation in the public schools. Because the decisions Professor Wechsler challenges doubtless comprise the most significant judicial restatement of our national policy in the past century, it seems important to consider whether the decisions are not in fact valid exercises of the power of judicial review.

Professor Wechsler begins his paper by delineating the differences between his position and that of Judge Hand. Judge Hand, it will be recalled, expounds the thesis that the Supreme Court's power to review the constitutionality of acts of other branches of national and state government is not one which can be found in or fairly inferred from the words of the Constitution. But the power of keeping government officials within their prescribed limits was one which, Judge Hand believes, the Court had to assume nonetheless: the absence of such a power would have invited anarchy, and "in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking."³ What this doctrine implies, however, is merely an authority, to be exercised as sparingly as possible, to confine officials to actions within their realms of assigned responsibility, but *never* an authority to review the substance of such actions. In arrogating to itself the latter authority—especially in measuring federal and state laws against the broad strictures of the fifth and fourteenth amendments—the Supreme Court has illicitly and undemocratically assumed the role of a "third legislative chamber."⁴

With Judge Hand's view of the propriety and scope of the Supreme Court's power of judicial review, Professor Wechsler takes profound issue. Like Marshall in *Marbury v. Madison*,⁵ Professor Wechsler sees the power of judicial review as one authenticated, and indeed required, by the supremacy clause of the Constitution.⁶ Judge Hand found the supremacy clause an insufficient source of power, arguing indeed that the specific mandate to *state* courts to defer to supreme federal law in the event of conflict "looks rather against than in favor of a general

³ HAND 29.

⁴ *Id.* at 55.

⁵ 5 U.S. (1 Cranch) 137 (1803).

⁶ U.S. CONST. art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

jurisdiction.”⁷ But Professor Wechsler pointedly demonstrates that the logic of this particular negative pregnant has most uncomfortable implications: it either denies to the Supreme Court, when processing appeals from state courts, the right to re-examine the constitutional determinations made by the state courts at the behest of the supremacy clause, or, perhaps even more paradoxically, it affirms the power of judicial review as an ingredient of the Supreme Court’s appellate jurisdiction over state courts while denying it in appeals from the lower federal courts and in those lower federal courts themselves.⁸

Positing the clear propriety of the power of judicial review—rather than giving it, after Judge Hand’s fashion, a left-handed welcome as the twilight child of a doctrine of necessity—Professor Wechsler asserts that its full exercise in cases within the Supreme Court’s jurisdiction is not dependent, as Judge Hand would have it, on “how importunately the occasion demands an answer,”⁹ but is a matter of obligation.¹⁰

From all this it follows that the power of judicial review cannot be confined, as Judge Hand none too hopefully seems to urge, to the job of charting “the frontiers of another ‘Department’s’ authority” rather than reviewing “the propriety of its choices within those frontiers.”¹¹ Professor Wechsler’s acceptance of the full sweep of judicial review carries with it acquiescence in the Supreme Court’s scrutiny of the substantive acts challenged as in conflict with constitutional limita-

⁷ HAND 28.

⁸ At this point in the argument, one who agrees with Professor Wechsler that the Constitution does imply a system of judicial review is impelled, nevertheless, to enter a partial demurrer to an analysis which overpowers but does not fully persuade. Indeed, it is an analysis so virulent as, by inversion, to undermine the Supreme Court’s asserted power to review state courts: if it is anachronistic to posit a supreme federal tribunal sitting in review of state courts whose power to review federal questions is not as broad as the obligation of the state courts to consider such questions below, the anachronism casts as much doubt on the appellate relationship—which is not spelled out in the Constitution—as on the claimed disparity of power to consider certain federal questions. The essential difficulty is that Professor Wechsler’s quasi-textual construct implies a purposive symmetry in the minds of the framers which might better have expressed itself in some explicit avowal of the powerful role to be played by the federal courts. Such avowal of the power of judicial review does not appear in the text of the Constitution. But, as Professor Wechsler indeed seems to acknowledge, the public expectation of Hamilton and others that the courts would utter the last word on constitutional questions seems an adequate basis for sustaining the authenticity of judicial review. Certainly it is a less taxing, if less ingenious, basis than Professor Wechsler’s potent syllogism.

⁹ HAND 15.

¹⁰ *Wechsler* 6. Professor Wechsler of course takes careful note of limitations on the exercise of this obligation: *e.g.*, the “political question” doctrine, which he sees as part of the Constitution’s basic distribution of authority; and the discretion, embodied in certiorari practice, deliberately confided to the Court to allow it largely to determine the character and sequence of the great public questions it adjudicates.

¹¹ HAND 29-30.

tions. But Professor Wechsler insists, and properly so, that this revisory power does not make the Supreme Court a "third legislative chamber" if the Court employs appropriately dispassionate standards. For judges charged with the task of judicial review must take their value spectrum from the Constitution and eschew the multitudinous and far more transient personal policy preferences which legislators can and should act upon.

Here indeed lies the heart of Professor Wechsler's thesis—insistence on the rational and disinterested application of constitutional norms to all comparable controversies. This is the recipe for a

"principled decision . . . one that rests on reasons with respect to all the issues in the case, reasons that in their generality and then neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. Otherwise, as Holmes said in his first opinion for the Court, 'a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions. . . .'"¹²

With this central thesis no quarrel should be forthcoming. No quarrel, that is, except from those whose legal litmus paper is sensitive to the identity of the litigant rather than the merits of his cause. But for those whose Constitution is grounded in accepted canons of judicial integrity, acquiescence in Professor Wechsler's neutral principles would seem automatic. As Justice Frankfurter observed a decade ago in *Terminiello*, when chastising his brethren of the majority for making a federal case out of a sow's ear: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency."¹³

With insistence on adjudication by neutral principle as his point of departure, Professor Wechsler turns to the formulation of a bill of particulars—asserted failures by the Court in the recent past to do its job of principled adjudication. And for a time he is on firm ground. Thus, the Court certainly seems to merit censure when it summarily disposes of important and difficult questions—for example, *Gayle v.*

¹² *Wechsler* 19.

¹³ *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949). The Court there by-passed an extremely difficult free-speech issue—found a very tractable one—by pouncing on an "error" never urged by petitioner in the state courts or in the Supreme Court. See BERNIS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 113-15 (1957); Pollak, *Mr. Justice Frankfurter—Judgment and the Fourteenth Amendment*, 68 YALE L.J. 304, 310 (1958).

Browder,¹⁴ invalidating segregation on intrastate buses—via the inscrutable *per curiam*. This is a method of adjudication which, as Professor Wechsler succinctly puts it, “makes it quite impossible to speak of principled determinations or the statement and evaluation of judicial reasons, since the Court has not disclosed the grounds on which its judgments rest.”¹⁵ And Ernest Brown has made persuasive demonstration that the method is one to which the Court is showing signs of addiction.¹⁶

The point at which Professor Wechsler invites serious controversy is when he shifts from the Court’s sins of omission to what he regards as its sins of commission. Here he singles out three crucial instances in which the Court has recently found race discrimination incompatible with the Constitution—the white primary, the restrictive covenant, and segregated public schools—and contends that none of these is based “on neutral principles and . . . entitled to approval in the only terms . . . relevant to a decision of the courts.”¹⁷ Plainly enough all of these milestone judgments have elicited in certain quarters the most vigorous kind of public criticism. But very little criticism has been forthcoming from those who believe, with Professor Wechsler, that these cases “have the best chance of making an enduring contribution to the quality of our society of any . . . in recent years.”¹⁸ His undisguised hostility to the discriminations there uprooted lends impressive weight to his doubts that the decisions are supportable. Conversely, the purity of his doubts imposes on those who have thought the decisions proper a special burden of reappraisal.

To make such a reappraisal is the main purpose of this essay. No attempt is here made to dissect Professor Wechsler’s concept of neutrality of constitutional adjudication. Quite the contrary: this essay accepts that concept on the assumption that what Professor Wechsler has in mind is exorcising, once and for all, “the kadi . . . dispensing justice according to considerations of individual expediency.” But it may be, as is suggested at the close of this paper, that Professor Wechsler is really hunting larger game. In that event, the careful scrutiny his theme of neutrality deserves must be undertaken elsewhere. It does not lend itself easily to the immediate objective, which is to review the momentous decisions Professor Wechsler is doubtful of.

¹⁴ 352 U.S. 903, *affirming* 142 F. Supp. 707 (D. Ala. 1956).

¹⁵ *Wechsler* 20.

¹⁶ Brown, *Process of Law*, 72 HARV. L. REV. 77 (1958); cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). Comment, 26 U. CHI. L. REV. 279 (1959).

¹⁷ *Wechsler* 27.

¹⁸ *Ibid.*

RESTRICTIVE COVENANTS

In *Shelley v. Kraemer*,¹⁹ the question was whether state courts could, consistently with the equal protection clause, compel Negro purchasers to vacate homes sold to them in contravention of racially restrictive covenants. The Court acknowledged that the fourteenth amendment curbs state authority as such, not private bigotry, and hence neither "the restrictive agreements standing alone" nor "voluntary adherence to their terms" presented any constitutional question.²⁰ The constitutional vice lay in judicial enforcement of the covenants; through their courts "the States have made available to . . . individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights" ²¹

Imputing Private Prejudice to the States

Professor Wechsler has no difficulty with the thought that court action is "state action" for fourteenth amendment purposes. What troubles him is the logic underlying "the crucial step . . . that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make." ²²

So formulated, the query posed by Professor Wechsler seems reasonable enough, and it assuredly is not put to rest by anything said in Chief Justice Vinson's opinion for the unanimous Court. But the very simplicity of the words in which the query is phrased may obscure the point at which analysis of the problem can profitably begin.

To say that the state, through one of its agencies, "does no more than give effect to an agreement," carries with it the pleasing sense of automation; asked to enforce a hypothetically valid private arrangement, a court has no option but to respond. And thus the state is insulated from responsibility for a course of action it has no hand in initiating.

A few moments' reflection should serve to clarify the reasons for attributing to the state responsibility for the private policies its courts elect to implement. A question posed by Professor Wechsler may serve as a convenient point of departure:

"Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of

¹⁹ 334 U.S. 1 (1948); cf. *Hurd v. Hodge*, 334 U.S. 24 (1948).

²⁰ 334 U.S. at 13.

²¹ *Id.* at 19.

²² *Wechsler* 29.

law, or is it a sufficient answer there that the discrimination was the testator's and not the state's? [Citing *Gordon v. Gordon*]."²³

The *Gordon* case was one of those unhappy internecine struggles to which our testamentary structure so often lends itself—an action by four sisters to terminate their brother's interest in the paternal estate because the brother, in contravention of father's will, had married a young lady so improvident as to be the issue of Catholic parents and hence "a person not born in the Hebrew faith." By way of defense, young Gordon urged, *inter alia*, that to enforce the limitation contained in his father's will was a restraint on religious freedom and inconsistent with other guarantees implicit and explicit in the fourteenth amendment. Cited in support of the argument were the restrictive covenant cases and the school segregation cases. But the Massachusetts Supreme Judicial Court concluded that those cases "involve quite different considerations from the right to dispose of property by will."²⁴ And the Supreme Court denied certiorari.²⁵

But before reaching the constitutional issue the Massachusetts court had dwelt at rather great length on the "contention . . . that a restriction conditioned upon the religious faith of the parents of the prospective wife at the time of her birth is unreasonable."²⁶ The issue was regarded as a new one in Massachusetts, but in reliance on foreign jurisdictions, particularly a line of New York decisions, the court concluded that the provision was a valid one. "The question is not whether the testator used good judgment . . . in his will or whether we should approve or disapprove his action. What we have to decide is whether he was prevented from doing as he did by a rule of law. We are unable to discover that he was."²⁷

The New York cases relied on had indeed uniformly sustained provisions of the kind at issue in *Gordon*—although (as the Massachusetts court observed but did not embroider on) "in each case . . . the court found a way to prevent the forfeiture of the estate."²⁸ As summarized by Judge Lehman twenty years ago, the New York rule is as follows:

"A condition calculated to induce a beneficiary to marry, even to marry in a manner desired by the testator, is not against public policy. A condition calculated to induce a beneficiary to live in

²³ *Ibid.* *Gordon v. Gordon* may be found in 332 Mass. 197, 124 N.E.2d 228, cert. denied, 349 U.S. 947 (1955).

²⁴ 332 Mass. at 208, 124 N.E.2d at 235.

²⁵ 349 U.S. 947 (1955).

²⁶ 332 Mass. at 207, 124 N.E.2d at 234.

²⁷ 332 Mass. at 207-8, 124 N.E.2d at 234.

²⁸ 332 Mass. at 207, 124 N.E.2d at 234.

celibacy or adultery is against public policy. . . . Conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy.”²⁹

Thus, in the recent *Rosenthal* litigation, Surrogate Collins bowed to the ineluctable New York rule:

“The petitioner’s situation commands the court’s sympathy. It is unfortunate that she cannot have both a marriage with the man of her choice *and* the inheritance. Present are considerations which tug at the heart but do not resolve the legal queries propounded by the petition. Undeniably, Article Twelfth is discriminatory but to discriminate in the disposition of property is frequently the motivation of a will. A testator ‘may exclude a child or other descendant from any participation in his estate for sound reason, or because of whim or prejudice which might seem unreasonable to others’ The court is compelled to uphold the manifest intent of the testator’s will. The determination was written into that will and is binding on the petitioner.”³⁰

As it turned out, Surrogate Collins did have some flexibility as to how to construe Mr. Rosenthal’s will—or so, at least, a divided Appellate Division and a divided Court of Appeals concluded, parsing the document with a generosity adequate to permit petitioner to “have both a marriage with the man of her choice *and* the inheritance.”³¹ Surrogate Collins was right, however, in his view that as a trial judge he had no leeway to reject or modify the law of New York framed for him by the Court of Appeals. But the strictures which bind Surrogate Collins did not inhibit Judge Lehman and do not inhibit those who today compose New York’s—or Massachusetts’—highest tribunal. As Judge Lehman made plain, the reasonableness—and hence the validity—of challenged testamentary limitations turns on the “public policy” of the state as that policy is fashioned and refashioned by its appellate judges. When the New York Court of Appeals decides that it will enforce a will designed to encourage Jew to marry Jew, or Catholic to marry Catholic, but that it will turn its stony judicial face against a testamentary provision “calculated to induce a beneficiary to live in celibacy” (a lawful and honorable status in most jurisdictions), the

²⁹ *Matter of Liberman*, 279 N.Y. 458, 464, 18 N.E.2d 658, 660 (1939).

³⁰ *In re Rosenthal's Estate*, 204 Misc. 432, 440, 123 N.Y.S.2d 326, 335 (Surr. Ct. 1953). *But cf.* Cardozo: “Judges march at times to pitiless conclusions under the prod of remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.” CARDOZO, *THE GROWTH OF THE LAW* 66 (1924).

³¹ 283 App. Div. 316, 127 N.Y.S.2d 778, *aff'd*, 307 N.Y. 715, 121 N.E.2d 539 (1954).

court is choosing a policy and acting upon it. Moreover, frequent expressions of judicial distaste for the discriminatory arrangements reluctantly sustained do nothing to lessen their impact. "[T]he undertones of the opinion . . . seem utterly discordant with its conclusion. . . . The case which irresistibly comes to mind as the most fitting precedent is that of Julia, who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" ³²

What has been said has of course no claim to novelty. But, at the risk of laboring the obvious, the nature of judicial choice—of sovereign choice voiced by the courts—has been rehearsed as a reminder of what Holmes observed half a century ago: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." ³³ It is the disposition of this "public force" which is really at issue when a court propounds the misleading neutralism, "What we have to decide is whether he was prevented from doing as he did by any rule of law." ³⁴ What the court has to decide is whether to *enforce*—to bring the "public force" to bear in behalf of—the testament or covenant which the draftsman was entirely free to commit to paper and which those within range of the instrument were entirely free to adhere to of their own volition. And when the arrangements contemplated by the instrument will fail but for the intervention of "public force"—when "it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages" ³⁵—the limitations of the fourteenth amendment come into play.

From Buchanan v. Warley to Shelley v. Kraemer

Of course, a finding of the requisite state action does not doom the challenged discrimination. The existence of state action is a threshold problem, and with "this hurdle cleared" there remains "the ultimate substantive question, whether in the circumstances of this case the action complained of was condemned by the Fourteenth Amendment. . . ." ³⁶ But in the case of the racial covenant, that "ultimate substantive question"—the absence of governmental power to put Negroes in one part of town and whites in another—had been determined by the Supreme Court long before in *Buchanan v. Warley*.³⁷ To be sure, the unanimous decision voiding the Louisville zoning ordinance

³² *Everson v. Board of Education*, 330 U.S. 1, 19 (1946) (dissenting opinion of Jackson, J.).

³³ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

³⁴ *Gordon v. Gordon*, 332 Mass. 197, 207-08, 124 N.E.2d 228, 234 (1955).

³⁵ *Barrows v. Jackson*, 346 U.S. 249, 254 (1953).

³⁶ *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 72 (1955).

³⁷ 245 U.S. 60 (1917).

was apparently put upon due process grounds³⁸ rather than upon equal protection to which the Court turned in *Shelley v. Kraemer*. Why the opinion in *Buchanan v. Warley* took the shape it did is not hard to conjecture; for one thing, the equal protection clause still bore the relatively fresh gloss of the "separate but equal" doctrine³⁹ which might have been thought to support the even-handed injustice of the ordinance; for another, the protagonist of the fourteenth amendment was the white seller disabled from selling to a Negro, and arguably he lacked standing to talk in equal protection terms.⁴⁰ Also, it bears remembering that *Buchanan*, decided in 1917, was the product of a judicial climate quite receptive to the conclusion that a challenged economic regulation "was not a legitimate exercise of the police power of the state."⁴¹ Surely an equal protection approach would have been more apposite, and, indeed, would have been the approach actually employed had the case arisen a generation later. Passing the question which section of the fourteenth amendment *Buchanan* should have turned on, the point vital to the validity of *Buchanan* (and, derivatively, of *Shelley*) is that the elimination of racial criteria in land acquisition and tenure was one of the few relatively clear purposes of the proponents of the fourteenth amendment. So much Justice Day made abundantly plain in *Buchanan*, relying on a statute of 1866,—the year the amendment was adopted by Congress—giving all "citizens, of every race and color . . . the same right in every State and Territory . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens. . . ." ⁴² The fourteenth amendment has come to the aid of many—from corporations to Communists—whom its framers may have had no special interest in; certainly in those instances where the framers' protective purpose is

³⁸ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

³⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴⁰ *But cf. Barrows v. Jackson*, 346 U.S. 249 (1953).

⁴¹ *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). *Cf. Bolling v. Sharpe*, 347 U.S. 497, 500 (1954): "Segregation in public education is not reasonably related to any proper governmental objective. . . ."

⁴² Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The statute, which was § 1 of the Civil Rights Act of 1866, also declared all persons other than untaxed Indians born in the United States "to be citizens of the United States." The statute was re-enacted as part of the Civil Rights Act of 1870, ch. 114, 16 Stat. 140, two years after the amendment's ratification, lending point to the Court's observation in *Oyama v. California*, 332 U.S. 633, 640 (1948), that it was "enacted before the Fourteenth Amendment but vindicated by it." Today the statute is to be found divided among two separate but companion code provisions, REV. STAT. §§ 1977-78 (1875), 42 U.S.C. §§ 1981-82 (1952).

The phrasing of the statute in terms of rights of citizenship is suggestive of a kinship with the privileges and immunities clause of the fourteenth amendment, rather than with the much more vigorously applied due process and equal protection clauses. Of course the emasculation of the privileges and immunities clause long antedated *Buchanan v. Warley*.

tolerably clear, there is, in the hallowed phrase, both "reason and authority" for giving it effect.

So much for *Buchanan v. Warley*. For perhaps the wrong reasons it rightly decided that the fourteenth amendment barred states from establishing Negro ghettos. It is familiar history that *Buchanan* and subsequent decisions⁴³ "caused white supporters of residential segregation to rely upon the judicial enforcement of racial covenants."⁴⁴ A generation elapsed in which, encouraged by dicta in *Corrigan v. Buckley*,⁴⁵ courts sustained the covenants with regularity. But if *Buchanan* was right, the result at last reached in *Shelley* was fore-ordained; for it had long been clear that whether a challenged discrimination is legislative or judicial is a matter of no consequence in finding the state action on which the fourteenth amendment operates.⁴⁶ The distribution of state power among the three branches of government "is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."⁴⁷ Thus, it was that *Shelley* at last correctly ratified the conclusion arrived at by an unsung federal trial judge in 1892 that the enforcement of a racial covenant was a denial of the equal protection of the laws.⁴⁸

The Limits of the Logic

What has been said thus far comes simply to this: *Shelley v. Kraemer*, like *Gordon v. Gordon*, was a case in which the courts were called on to get people to do things they might have done—but also might not have done—voluntarily. The racial covenant in *Shelley* was unenforceable judicially because the state lacks power to limit land tenure and occupancy by race.

It would seem to follow that the enforceability of the testamentary limitation in *Gordon v. Gordon* should depend on the substantive ques-

⁴³ *Harmon v. Tyler*, 273 U.S. 668 (1927); *Richmond v. Dean*, 281 U.S. 704 (1930).

⁴⁴ VOSE, CAUCASIANS ONLY 52 (1959).

⁴⁵ 271 U.S. 323 (1926).

⁴⁶ Democratic theory suggests that the distinction is not unimportant at the ultimate point of testing substantive constitutionality. The United States in its Brief Amicus Curiae, pp. 83-85, *Shelley v. Kraemer*, 334 U.S. 1 (1948), suggests that presumptions of validity attendant on legislation do not work so powerfully to sustain judicial law-making.

⁴⁷ *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

⁴⁸ *Gandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892). Properly speaking, the federal court's inability to enforce the covenant should have been articulated in fifth amendment terms. See *Hurd v. Hodge*, 334 U.S. 24 (1948). Especially so in the era before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

tion whether the state has power to inhibit—perhaps to prohibit altogether—miscegenation of Jews and others. If it has not—and one may infer from Professor Wechsler's criticism of *Naim v. Naim*,⁴⁹ where the Court clumsily retreated from passing on Virginia's anti-miscegenation statute,⁵⁰ that he reads the Constitution adversely to the power⁵¹—then enforcement should have been denied.

But it would be idle to suggest that an analysis which sustains *Shelley v. Kraemer*, or undercuts *Gordon v. Gordon*, sufficiently answers further questions which Professor Wechsler properly sees latent in *Shelley*:

"What is the principle involved? . . . Can the state, indeed, employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? . . . Would a judgment of ejectment?"⁵²

In short, Professor Wechsler is asking whether every instance of judicial cognition of private discrimination is state action prohibited by the fourteenth (or fifth) amendment. The answer is "No." But the answer calls for amplification and for some indication of the categories of situations to which these constitutional prohibitions should and should not apply.

As a starting point, it may be useful to revert to the *Gordon* case, and to Professor Wechsler's query whether the state is "forbidden to effectuate a will that draws a racial line." Reflection suggests that the hypothesized "will that draws a racial line" really embraces two quite different kinds of situations—and the difference between them may have vital implications.

In one of these situations the state power is exerted—or, if not exerted, waits in the wings—to induce compliance by others with the

⁴⁹ 350 U.S. 891 (1955), 350 U.S. 985 (1956).

⁵⁰ The Virginia Supreme Court of Appeals sustained the annulment of the marriage of a white woman and a man of Chinese ancestry, apparently resident in Virginia. 197 Va. 80, 87 S.E.2d 749 (1955). On appeal, the Supreme Court remanded the case for amplification of a record whose "inadequacy . . . as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia" was thought to interfere with resolution of the constitutional issues. 350 U.S. 891 (1955). The Virginia court's stated inability to arrange for an ampler record, 197 Va. 734, 90 S.E.2d 849 (1956), left the case "devoid of a properly presented federal question" and necessitated dismissal of the appeal. 350 U.S. 985 (1956).

⁵¹ *Wechsler* 34. Some day, hopefully, the Court will feel itself able forthrightly to invalidate such laws. See *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948).

⁵² *Wechsler* 29-30.

discriminatory behavior patterns favored by the testator. This was what happened in *Gordon*, where the state power to terminate the son's interest in his father's estate was utilized as a means of restraining the son from marrying a non-Jew.

In the second situation the state's acquiescence in the testator's prejudices extends only to the point of learning his purpose—not to the point of using state power to compel conformity by others with the discriminatory pattern. Thus, let us suppose that in *Gordon* the testamentary limitation barred any share in the estate to a child who had, before learning the terms of his father's will, married a non-Jew. Under these circumstances, the probate court's necessary inquiry would be confined to identifying which of the children were the intended beneficiaries of the testator's prejudice. A determination that the son had previously married a Catholic and thereby disqualified himself would not be coercive of the son's or anyone else's present or future behavior. Here judicial enforcement of the limitation would no more adopt the testator's prejudices than would enforcement of a will dividing the testator's property among three named persons all of whom are Jews and selected for that reason—an exercise of private prejudice the fourteenth amendment can hardly be thought to interfere with.

What marks the line between these cases? The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained. The principle underlying the distinction is this: the fourteenth amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprise, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred.

What does this view of the amendment mean in concrete terms? It means that an employer may freely contract with a union to maintain a lily-white shop, but that the provision is one which fails whenever the employer's self-interest so dictates: the union cannot coerce compliance through an injunction or an award of damages. Conversely, however, a court need not—at the behest of Negro third-party maleficiaries—compel abandonment of the provision.⁵³ Judicial refusal

⁵³ Compare *Black v. Cutter Laboratories*, 351 U.S. 292 (1956). An employee of Cutter Laboratories was discharged on the stated grounds of Communist Party membership and misrepresentation of her pre-employment history. The collective bargaining agreement permitted discharge for "just cause," and a board of arbitration held, on the union's petition for reinstatement, that the employee had actually been fired for union activity which was of course held not to be "just cause." On petition for enforcement of the award the lower California courts affirmed the board's order of reinstatement, but the state supreme court reversed. 43 Cal. 2d 788, 278 P.2d

to interfere is entirely analogous to legislative disinclination to enact a fair employment practices act—a sovereign decision to leave private prejudice alone. (Conversely, of course, the fourteenth amendment would be no barrier if the courts or the legislature were to insist that private hiring proceed on a non-racial basis.)⁵⁴

To take a very different example, this view of the amendment means that the homeowner can continue to turn others off his premises, no matter how outrageous his standards of exclusion, and may call on the police to enforce the laws of trespass on his behalf. So too—as lawyers have supposed ever since the Court in the *Civil Rights Cases*⁵⁵ held it beyond Congress' power under the fourteenth amendment to bar the exclusion of Negroes from private "inns, public conveyances . . . and other places of amusement"—with the proprietor of an ice cream

905 (1955). The Supreme Court granted certiorari, 350 U.S. 816 (1956), and then, after briefs and argument, dismissed the writ. 351 U.S. 292 (1956).

The majority of the Court found that the California Supreme Court had held that "just cause" included Communist Party membership, and that this holding disposed of the case on non-federal grounds. Justice Douglas, joined by Chief Justice Warren and Justice Black, dissented. The dissenters were less certain of the state supreme court's rationale, but felt that if that court had refused enforcement on the ground that "just cause" included Communist Party membership, this was judicial action of the same character condemned in *Shelley v. Kraemer*.

The analysis proposed in the text suggests that both the majority and the dissenting opinions were wrong: the dissenters were wrong in characterizing what happened as one in which California's "courts [were] implicated in . . . a discriminatory scheme." 351 U.S. at 302. Assuming the union and the employer did agree that Communist Party membership was a bar to employment or an appropriate ground for discharge, all that the California courts did was to leave the situation alone—i.e., not interfere with the employer's exercise of a right it and the union agreed the employer should possess. On the other hand, if the employer had failed to discharge an employee for a reason—e.g., Communist Party membership, or being a Negro—that it had promised the union would disqualify an employee from continued service, the union's resort to the courts to compel discharge in conformity with the agreement would have meant that the "courts [were] implicated in . . . a discriminatory scheme."

Conversely, the too-broad reasoning of the majority concluding that construction of the term "just cause" in the bargaining agreement to include Communist Party membership was a matter of "local law" presenting no federal question must be regarded as unsound. There was in fact no federal question in the case the Court decided, because the California courts simply left the employer free to act or fail to act in the fashion the employer and the union had mutually agreed upon. But a federal question of major proportion would have been presented if the California courts had been called on to compel the employer, against its wishes, to discharge an employee in conformity with the judicial interpretation of a contractual obligation to fire a class of worker whose delineation was construed as embracing such criteria as being a Communist or a Negro. (This discussion is *not* meant to suggest that the constitutional questions involved in judicially compelling the discharge of a Communist *qua* Communist and a Negro *qua* Negro are interchangeable.)

This consideration of *Black v. Cutter Laboratories* has not necessitated any classification of the arbitration proceeding as state or non-state action. Such a classification should depend on whether adherence to an arbitral award is the voluntary election of the parties or depends (as in *Black v. Cutter Laboratories*) on the availability of a court order enforcing the award.

⁵⁴ See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945), and *cf.* *Williams v. International Bhd.*, 27 Cal. 2d 586, 165 P.2d 903 (1946).

⁵⁵ 109 U.S. 3 (1883).

parlor.⁵⁶ So, too, with the board of directors of a private cemetery.⁵⁷ When the employees and the union, or the private homeowner and the petty merchant, are aggregated many times into a comprehensive social entity such as a company town, *Marsh v. Alabama*⁵⁸ of course suggests that exclusion or refusal to hire by reason of color or faith or political persuasion is inadmissible. But this is precisely because the fourteenth amendment is directed at community arrangements, and its mandates cannot be circumvented by local concepts of property which purport to make a private barony of a social organism having "all the characteristics of any other American town."⁵⁹ To be sure, it is relatively easy to put the one-family dwelling, the cemetery and the ice cream parlor on one side of a line and the company town on the other side; charting closer cases will be harder, but the process will be one of those measurements of subtle but decisive differences in degree which are the familiar province of constitutional adjudication.

Thus, it is suggested, the individual may select his guests at will. And he may—again, in the absence of limitations imposed by local law—hire only elderly Negro women to wait upon his table and refuse to sell or lease his home to any but militant vegetarians. But if he gives his home to Harvard to be a residence for Negro graduate students, that limitation is one that the members of the Harvard Corporation should be free to observe or refrain from observing as they choose, without judicial or other state intervention—assuming the limitation is

⁵⁶ See *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958). Simply licensing someone to do business does not make him a state agent; indeed extending tax exemptions or powers of eminent domain or both may not be sufficient. See *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). But compare the limitations assumed by one who operates a governmentally conferred monopoly. See *Pollak v. Public Util. Comm'rs*, 342 U.S. 848 (1951); *cf. Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952).

⁵⁷ In *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1954), the Court affirmed by an equally divided vote the lower courts' dismissal of a damage suit brought by a widow against a private cemetery which had refused to bury her Indian husband in a lot she had purchased, the refusal being predicated on a limitation of interment to non-Caucasians contained in the deed of sale of the burial lot. When apprised, on petition for rehearing, of an Iowa statute (provoked by the notoriety of the case) designed to prevent racial discrimination in interment in the future, the Court vacated its original affirmance and dismissed the writ of certiorari as improvidently granted; three justices dissented from dismissal of the writ. 349 U.S. 70 (1955).

In terms of the analysis proposed here, the private cemetery was entitled to refrain from according interment for any arbitrary reason, and the fourteenth amendment did not impose on the Iowa courts an obligation to compel the cemetery to abandon its perversity at the instance of Mrs. Rice. Under Iowa law she had an enforceable contract right to have the cemetery inter qualified Caucasians—but not her husband—in the lot she purchased. The fourteenth amendment gives her no greater right.

⁵⁸ 326 U.S. 501 (1946), reversing the trespass conviction of a Jehovah's Witness who distributed religious tracts on the streets of a company town; see *Tucker v. Texas*, 326 U.S. 517 (1946). Compare *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

⁵⁹ *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

one which is itself a preference proscribed by the fourteenth amendment. And, it would seem to follow, a reversionary clause to take effect on failure of the limitation could not be enforced by a declaratory judgment, by ejectment, or otherwise.⁶⁰

Of course it must be acknowledged that no pure logical line can be drawn between, on the one hand, permitting the members of the Harvard Corporation to observe the limitation in their discretion and, on the other, denying access to the courts to enforce the limitation. As Elias Clark has made abundantly clear in his extremely perceptive study of the implications of the *Girard College Case*,⁶¹ the law touches the modern charitable trust at so many points that its "administration . . . must ultimately be characterized as state action."⁶² But it is also true, as Professor Clark observes, that, "in the last analysis, all human activity is controlled by law."⁶³ In short, we are again faced with the ineluctable duty of making distinctions of degree. And distinctions between more formal and less formal manifestations of state authority are defensible until the essentially experiential process of constitutional litigation demonstrates their inadequacy. Certainly one would be ill-advised to launch a permanent and categorical demarcation exempting the discretion of the administrators of charitable trusts from constitutional scrutiny. "Were the Ford Foundation to disperse its millions on a discriminatory basis, society would find the result intolerable."⁶⁴ So too, perhaps, with the powers exercised by vast industrial and financial entities pursuant to state charters of incorporation.⁶⁵ Yet there is much wisdom in Professor Wechsler's preference that "the issues [be] faced through legislation, where there is room for drawing lines that courts are not equipped to draw."⁶⁶ In practical terms this is presumably the answer, for the hypothesized discriminations of the Ford Foundation or the steel industry would be met by corrective legislation long before a proper case had lumbered its way past the paper curtain of certiorari into its final resting place in the U. S. Reports.

⁶⁰ See *Capital Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957); but cf. *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956).

⁶¹ *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957), discussed at text accompanying note 68 *infra*.

⁶² Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard*, 66 YALE L.J. 979, 1008 (1957).

⁶³ *Id.* at 1009.

⁶⁴ *Ibid.*

⁶⁵ Compare Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952).

⁶⁶ Wechsler 31.

But one who essays to tinker with constitutional theory may not properly take refuge in the likelihood of less-than-constitutional solutions to bail him out of following the limits of his logic. He must face the fact that the distinction between judgments of the Massachusetts Supreme Judicial Court and decisions of the members of the Harvard Corporation cannot permanently be sanctified in terms of state versus private action. What is offered is tentative, a beginning point, premised on the avowed value judgment that in 1959 it is consistent with the democratic theory embodied in the fourteenth amendment to let the members of the Harvard Corporation choose if they will to prefer Negroes—or whites, or Christian Scientists—in order to assure a further flow of endowment, or for any other reason. Conversely, it is submitted, for the Massachusetts Supreme Judicial Court to compel adherence to a discriminatory standard is not consistent with that democratic theory.

Very likely the conventional conceptualisms of state versus private power underlying the supposed distinction between judicial enforcement and trustee discretion will trouble many lawyers habituated to the more searching inquiries of legal realism. And properly so. Yet the distinction is one which at least in retrospect seems to account for the result in the case which implicitly “posed a threat to every charitable trust”⁶⁷—the *Girard College Case*. There the City of Philadelphia, acting through an official board as trustee pursuant to the will of Stephen Girard, had since long before the fourteenth amendment utilized the fortune left by Girard to operate a school for “poor, male white orphan children.” In 1957, at the behest of two Negro boys who had vainly sought admission, the Supreme Court held (without hearing argument) that “even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State. Such discrimination is forbidden by the Fourteenth Amendment.”⁶⁸ On remand the Pennsylvania courts replaced the City of Philadelphia with private trustees so that Girard’s dominant discriminatory purpose might continue to be fulfilled;⁶⁹ and the Supreme Court declined to review the new arrangement.⁷⁰ A private

⁶⁷ Clark, *supra* note 62, at 1002.

⁶⁸ *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957).

⁶⁹ *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958).

⁷⁰ 357 U.S. 570 (1958). Passing the possibility that the denial of certiorari betokens no approval of the Pennsylvania judgment authorizing the substitution of private trustees capable of discriminating, the *Girard College Case* also raises special questions about the validity of state action (substitution of trustees) precisely calculated to perpetuate a theretofore unlawful racial ban. But these questions are tangential to the present discussion. Moreover it is perhaps inappropriate for the writer, who was of counsel, to relitigate the *Girard College Case* in this forum.

undertaking had been remitted to private hands, and the structure of charitable discrimination appeared secure. Yet if the thesis advanced in the preceding discussion has validity, the perpetuation of Stephen Girard's discriminatory plan may not be permanent. For a change of heart among the private trustees could lead to an abandonment of the exclusionary scheme with which the Pennsylvania courts should be held powerless to interfere.

The concern generated by the *Girard College Case* in some legal circles mainly stemmed from the feeling that a fundamental right to make arbitrary testamentary dispositions was in jeopardy. It is surely appropriate to recognize the high premium Anglo-American traditions put upon testamentary freedom. But other values also come into play. Every community imposes limits of some sort on how far the decedent may project his idiosyncracies into the future. And the appropriateness of setting these limits is not open to question because, in the quaint phrase, "the right to take property by devise or descent is the creature of the law, and not a natural right. . . ." ⁷¹ But it is precisely those enterprises that are "creature[s] of the law" to which the fourteenth amendment is addressed.

Reappraisal in fourteenth amendment terms of those nominally private arrangements which are "creature[s] of the law" is only beginning. Without torturing the prevailing syllogism, which is our heritage from the *Civil Rights Cases*, that the fourteenth amendment speaks only to state action, the frontiers of state action could be pushed forward to embrace much—*e.g.*, trustee discretion—not presently included. Alternatively there is ground for arguing that preservation of fourteenth amendment rights may necessarily and properly require national restraints—perhaps only by Congress, perhaps by the courts as well—upon private action which tends to undermine the opportunity to enjoy those rights. The principles which support national regulation of intrastate commerce where necessary to the protection of interstate commerce ⁷² may have some transferability. ⁷³ But for many—and perhaps most—present purposes there has been no compelling demonstration of the need to push the fourteenth amendment to the ultimate limits of its logic. We are at a way station. Case by case—as in other realms of constitutional adjudication—experience will push us forward.

⁷¹ *Magoun v. Illinois Trust & Sav. Bank*, 170 U.S. 283, 288 (1898). See *Knowlton v. Moore*, 178 U.S. 41, 55 (1900).

⁷² See *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914); *Southern Ry. v. United States*, 222 U.S. 20 (1911). *Cf.* the concurring opinion of Justice Pitney in *Newberry v. United States*, 256 U.S. 232, 275, 285-90 (1921).

⁷³ See *Marsh v. Alabama*, 326 U.S. 501, 506-7 (1946); *but cf.* the concurring opinion of Justice Frankfurter, *id.* at 510.

WHITE PRIMARIES

A closely related area of adjudication in which experience has already pushed us forward is the group of cases testing the validity of the white primary. From the turn of the century to World War II the white primary was the principal device by which the white South barred Negroes from participating in the political process. When the exclusion of Negroes from the primary was a formal state requirement, its invalidity was pretty clear. It was widely assumed that relinquishment of formal state controls of the primary would effectively and constitutionally permit the dominant Democratic Party to perpetuate the exclusion as a private venture. For a time this worked. But in 1944, in *Smith v. Allwright*,⁷⁴ the Court changed its mind, imposing on the Texas Democratic Party standards of equal treatment derived from the fifteenth amendment which, like the fourteenth, is directed in terms only at state action.

The result in *Smith v. Allwright* seems inconsistent with the result ultimately reached in the *Girard College Case*, where state disengagement apparently sufficed to authenticate continued racial exclusion. Is there an explanation for the apparent inconsistency? Are there, despite Professor Wechsler's doubts, "neutral principles that satisfy the mind"⁷⁵ which support *Smith v. Allwright*? To answer these queries a closer scrutiny of the primary cases seems in order.

The first of the white primary cases was *Nixon v. Herndon*,⁷⁶ in which Holmes for a unanimous Court held that a Texas statute barring Negroes from voting in the Democratic primary violated the fourteenth amendment. The next Texas statute vested in the State Executive Committee of the Democratic Party power to set criteria for admission to the primary—and Nixon returned to court when the committee exercised its power so as to bar Negroes. Again Nixon prevailed, Cardozo in *Nixon v. Condon*⁷⁷ holding for a divided Court that the committee was acting on behalf of the state. Invalidation of the second statute left authority to determine admission to the Democratic primary in the hands of the Democratic state convention, where, Cardozo had indicated, it inherently belonged. The convention's refusal to let Negroes vote in the primary precipitated *Grovey v. Townsend*,⁷⁸ which unanimously sustained the exclusion as a private discrimination untouched by the fourteenth and fifteenth amendments.

⁷⁴ 321 U.S. 649 (1944).

⁷⁵ Wechsler 29.

⁷⁶ 273 U.S. 536 (1927).

⁷⁷ 286 U.S. 73 (1932).

⁷⁸ 295 U.S. 45 (1935).

The *Classic* case⁷⁹—ratifying federal authority to protect the integrity of Louisiana primaries for candidates for federal office—served to instruct the Supreme Court that in most Southern states the Democratic primary is effectively the election. With this in mind the Supreme Court in *Smith v. Allwright* decided to reconsider the issue posed in *Grovey v. Townsend*. Specifically what concerned the Court was whether the presence in *Nixon v. Condon* and the absence in *Grovey v. Townsend* of a statute vesting discretion in an organ of the Democratic Party to determine admissibility to the primary was really a matter of constitutional dimension—whether, in short, the Court could sanction “a variation in the result from so slight a change in form.”⁸⁰ The answer was in the negative. “The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant . . . is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”⁸¹ And in *Terry v. Adams*,⁸² in 1953, the Court reaffirmed the holding of *Smith v. Allwright* in even more extreme circumstances. For there Negroes were barred not from the county primary as such but from a pre-primary plebiscite conducted by the Jaybird Democratic Association. Justice Black wrote:

“The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. . . . The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the . . . Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.”⁸³

From a doctrinal point of view the issue these cases present is that of finding the state action on which the Constitution imposes limitations when all the state has done, as in the *Girard College Case*, is to withdraw from the arena—“casting its electoral process in a form which

⁷⁹ *United States v. Classic*, 313 U.S. 299 (1941).

⁸⁰ *Smith v. Allwright*, 321 U.S. 649, 661 (1944).

⁸¹ *Id.* at 664.

⁸² 345 U.S. 461 (1953).

⁸³ *Id.* at 469-70.

permits a private organization to practice racial discrimination. . . ."⁸⁴ Is failure to restrain private prejudice equatable with active state discrimination? A bald affirmative answer sounds destructive of principles regarded as settled ever since the *Civil Rights Cases*. But even there, it is well to remember, the Court's conclusion that Congress could not penalize "the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation,"⁸⁵ involved a pertinent judicial assumption. The assumption was that such refusal constituted "an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears."⁸⁶ Is there an intimation that if the contrary were made to appear, if it were demonstrable that a state afforded a Negro no remedy for such a discrimination, one might then establish a basis for invoking a federal remedy fashioned by Congress or the courts? Perhaps. At all events, long after the *Civil Rights Cases*, Chief Justice Taft—in the very different context of labor relations—articulated for the Court a federal right of protection from state withdrawal of a pre-existing civil remedy:

"It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."⁸⁷

Finally, note should be taken of the Court's recent opinion in *Railway Employees' Dept. v. Hanson*.⁸⁸ This was an action brought by nonunion employees of the Union Pacific Railroad to enjoin enforcement as against them of the union shop provisions of a collective bargaining agreement entered into between a railway brotherhood and the carrier: being required to pay union dues as the price of holding their jobs was said by plaintiffs to breach various constitutional liberties. But wherein lay the governmental action subject to constitutional limitation? Nebraska, in whose courts the action was brought, had a "right to work law" which made union shop provisions unenforceable.

⁸⁴ *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

⁸⁵ 109 U.S. 3, 24 (1883).

⁸⁶ *Ibid.*

⁸⁷ *Truax v. Corrigan*, 257 U.S. 312, 329-30 (1921).

⁸⁸ 351 U.S. 225 (1956).

From 1934 to 1951 the Federal Railway Labor Act had contained a similar provision governing collective bargaining agreements in the railroad industry. But in 1951 Congress reversed its policy and amended the Railway Labor Act so as to *permit* the negotiation of such agreements, the laws of "any state" to the contrary notwithstanding. Plaintiffs argued that this pre-emptive act subjected the resultant union shop provision, which the contracting parties were then free to adopt or not as they chose, to fifth amendment limitations. Numerous *amici* attorneys general—including Attorney General Almond of Virginia and Attorney General Shepperd of Texas—filed briefs endorsing this view.⁸⁹ And the Court agreed, citing *Smith v. Allwright*: "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."⁹⁰

What has been said above puts the emphasis in the white primary cases on the shift from state regulation to formal state neutrality, with the suggestion that doctrinally the state is still responsible for abandoning a situation "in a form which permits a private organization to practice racial discrimination."⁹¹ This, it is submitted, is an inadequate basis for supporting the results reached in *Smith v. Allwright* and *Terry v. Adams*, for it suggests that a different result would and should have been reached if the state had never played a formal role and *Nixon v. Herndon* and *Nixon v. Condon* had not been litigated. Fortunately, *Smith v. Allwright* and *Terry v. Adams* need not and they in fact do not depend on imputing to the state continued responsibility for an activity which the state once regulated. If this were their rationale, the fourteenth amendment would have been dispositive of these cases, as it was of *Nixon v. Herndon* and *Nixon v. Condon*. *Smith v. Allwright* and *Terry v. Adams* actually stand on narrower and firmer ground—the fifteenth amendment, which expressly protects "the right to vote" against abridgement "on account of race, color, or previous condition of servitude."

Yet how can the fifteenth amendment apply where the fourteenth does not, since both are addressed to state action? The question generates its own answer: with respect to the particular problem to

⁸⁹ Attorney General Cook of Georgia filed a statement supporting the brief filed by Attorney General Shepperd. It is notable that the AFL-CIO, in an *amicus* brief supporting the union shop agreements, likewise urged that they be tested against constitutional limitations.

⁹⁰ 351 U.S. at 232. The Court went on to hold the union shop constitutional. See also *Allen v. Southern Ry.*, 43 L.R.R.M. 2652 (N.C. Sup. Ct. 1959); *Looper v. Georgia S. & F. Ry.*, 213 Ga. 279, 99 S.E.2d 101 (1957).

⁹¹ *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

which the fifteenth amendment is addressed—protecting the right of Negroes not to be discriminated against at the polls—the amendment must impose on the states a heavier affirmative duty to assure an equal franchise than does the fourteenth. If this were not so, the fifteenth amendment would be a redundancy, having no scope for separate and effective application.

Construing the fifteenth amendment to be an independently meaningful guarantee is in harmony with its framers' comprehensive purposes. "It was . . . well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that of presidential elector down to the most petty election for a justice of the peace or a fence-viewer."⁹² But the Court had learned in *Classic* that in the deep South the only opportunity to exercise the constitutionally protected right to vote arises at the primary (or, as in *Terry v. Adams*, the pre-primary) balloting. Thus, to find no state duty to prevent the exclusion of Negroes from the only elections which matter would be to delete the fifteenth amendment from the Constitution.

Smith v. Allwright and *Terry v. Adams* do not mean, as Professor Wechsler suggests they mean,⁹³ that the Constitution would prevent a dominant political party from excluding from its primary the members of a disfavored faith. For the fifteenth amendment speaks only to racial distinctions, not to religious distinctions or any of the other arbitrary classifications interdicted by the equal protection clause.

In short what Professor Wechsler sees as a cognate form of exclusion could be reached only through the fourteenth amendment. Imposing fourteenth amendment restraints on a southern Democratic primary would have to be predicated on a judgment that managing the electoral process is an inalienable sovereign function, and that whoever does that managing acts on the state's behalf. Perhaps such a judgment is supportable. "Only a State can own a Statehouse; only a State can get income by taxing."⁹⁴ So too, it may be plausibly urged, only a state can conduct elections—especially so where the state is one in which, under the Constitution, a republican form of government is perpetually guaranteed.⁹⁵ But the argument, whatever its validity, is one which goes far beyond the limited guarantee of racial equality in the political process embodied in the fifteenth amendment and properly vindicated in *Smith v. Allwright* and *Terry v. Adams*.

⁹² MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 38 (1909).

⁹³ Wechsler 29.

⁹⁴ Frankfurter, J., in *New York v. United States*, 326 U.S. 572, 582 (1946).

⁹⁵ U.S. CONST. art. IV, § 4.

THE SCHOOL SEGREGATION CASES

Of the cases which trouble Professor Wechsler, the one which causes him the greatest concern is the initial decision in *Brown v. Board of Education*,⁹⁶ decreeing the invalidity of state-imposed segregation in public schools. If Professor Wechsler's criticisms were simply addressed to the form of the Court's opinion in *Brown*, one would be hard put to dispute them. Certainly the opinion is most obscure in its crucial elements—*e.g.*, is inequality a "fact"? Whatever it is, how do judges determine it? Moreover, the opinion does not appear to articulate any grounds for disposing of the arguably quite different issues—segregated beaches,⁹⁷ golf courses,⁹⁸ buses,⁹⁹ and parks¹⁰⁰—subsequently resolved per curiam in apparent reliance on *Brown*.

But Professor Wechsler goes further. He suggests that the problem in *Brown* is not one of discrimination at all, for both races are disadvantaged and the burden of guilt surely falls more heavily on whites than on Negroes. The real legal issue, Professor Wechsler believes, is a claim of right of association balanced against an equal and opposite claim of right of nonassociation. Seeing the issue this way, he seems to suggest that no supportable opinion could have been written in *Brown*—or at least that writing such an opinion is a "challenge" not yet successfully met.¹⁰¹ Faced with this challenge, perhaps one who supports the judgment but confesses dissatisfaction with the opinion rendered has some obligation to draft what he regards as an adequate opinion:

"These four consolidated cases, which come to us from three federal district courts and one state supreme court, present a single question: the compatibility with the Fourteenth Amendment's equal protection clause of state laws which require, or permit local authorities to require, segregation of white and Negro school children in compulsory public schools. The courts below all sustained the challenged laws; but there was division among them on the subsidiary issue whether it is harmful to Negro children, in whose behalf these class actions were brought, to shunt them off on racial grounds to schools which are the equivalent in every non-racial dimension of the white schools

⁹⁶ 347 U.S. 483 (1954).

⁹⁷ *Baltimore v. Dawson*, 350 U.S. 877 (1955).

⁹⁸ *Holmes v. Atlanta*, 350 U.S. 879 (1955).

⁹⁹ *Gayle v. Browder*, 352 U.S. 903 (1956).

¹⁰⁰ *New Orleans Parks Ass'n v. Detiege*, 358 U.S. 54 (1958).

¹⁰¹ *Wechsler* 34.

from which they are barred. (In the Delaware case, the state supreme court found that, quite apart from racial separation, the Negro school was not the equivalent of the white schools.)

"At the outset we are strongly urged to affirm without further ado on the ground that educational policy is beyond the purview of federal power. As a general proposition this is of course true. The management of American schools is one of the most cherished and vital local prerogatives, and the enormous success of American public education doubtless owes much to the diversity born of our federal structure. But public education, like all other publicly regulated enterprises, must conform to the comprehensive standards which the Fourteenth Amendment imposes on all state activity. *West Virginia v. Barnette*, 319 U.S. 624; cf. *Pierce v. Society of Sisters*, 268 U.S. 510.

"It is also urged upon us that the extensive research into the history of the Fourteenth Amendment's adoption, so diligently conducted by counsel at our request, fails to disclose any intent on the part of the framers to end segregation in public schools. We think it is true, but not of itself dispositive. For one thing, it is familiar constitutional history that this Court has progressively brought within the ambit of the Fourteenth Amendment many issues and many litigants probably not contemplated by those who framed and ratified the Amendment. Moreover—and of more immediate moment—we read the history of the Amendment as contemplating an essentially dynamic development by Congress and this Court of the liberties outlined in such generalized terms in the Amendment.

"Next it is argued that the precise question at issue has already been disposed of by this Court in *Plessy v. Ferguson*, 163 U.S. 537. In response it is said that *Plessy* dealt with segregation on intrastate railways, and is distinguishable. We think it is not possible to ignore this Court's heavy reliance, in sustaining the segregation challenged in *Plessy*, on what it regarded as the manifest validity of segregated public schools. But we do not doubt our power, or indeed our obligation, to re-examine grave constitutional questions in a proper case. Given the finality of constitutional determinations, they must always be 'open

to reconsideration, in the light of new experience and greater knowledge and wisdom.' 317 U.S. XLII, XLVII (Remarks of Chief Justice Stone on the death of Justice Brandeis). And this is especially true when the constitutional provisions at issue are themselves of an evolutionary generality.

"*Plessy v. Ferguson* essentially rests on three interconnected propositions. The first is that the equal protection clause was intended to secure equality of 'civil and political rights' but was not intended to affect social relationships. The second is that 'Jim Crow laws'—laws requiring segregation of whites and Negroes—operate only in the social arena. The third is that such laws—providing as they commonly do 'separate but equal' facilities—neither impose nor imply inequality except as such inequality lies in the eye of the beholder.

"We think that on re-examination these propositions cannot be sustained. Nothing in the equal protection clause suggests a dichotomy between laws affecting civil and political rights and those affecting social relationships. That clause proscribes *all* laws which impose special disabilities on particular persons or groups without any reasoned basis for the differential treatment. Therefore we must decide (1) whether there is a demonstrable state need for the racial divisions imposed by the Jim Crow laws here involved, and (2) whether these racial divisions work significant harm to the segregated Negro.

"On the issue of the reasonableness of governmentally imposed distinctions between whites and Negroes, as well as on the issue of whether harm accrues to either group through enforced separation, we have been deluged with scholarly writings. These writings supplement extensive testimony which is of record in some, but not all, of the cases before us. Learned and impressive authority is deeply engaged on both sides of these twin issues. Were it our function to assess what has been put before us, we would find ourselves unpersuaded that there are demonstrable differences other than those of pigment between whites and Negroes, or that any state policy other than the impermissible one of nourishing race prejudice (see *Hirabayashi v. United States*, 320 U.S. 81) underlies the re-

quirement that the races be separated. Moreover, we would be inclined to surmise that governmental separation of the races sets in motion grievous consequences for whites and Negroes alike.

"But, assuming we were competent to make such judgments, we do not think we are called on to do so in order to determine the issues presently tendered. For we start from the base point that in the United States 'all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.' *Korematsu v. United States*, 323 U.S. 214, 216. Certainly legislation cast in such terms is not entitled to the ordinary presumptions of validity. On the contrary there is special need for 'a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities.' Justice Stone dissenting in *Minersville School District v. Gobitis*, 310 U.S. 586, 606. See *United States v. Carolene Products*, 304 U.S. 144, 152, n.4. We could not, therefore, sustain the reasonableness of these racial distinctions and the absence of harm said to flow from them, unless we were prepared to say that no factual case can be made the other way. As indicated above, we are not prepared to say this.

"We have said that we do not think it incumbent upon us, at least for present purposes, to resolve controversies as to the justification for and impact of Jim Crow legislation. But we would be less than candid if we failed to acknowledge that denial of the degrading effects of such legislation seems to us to border on the disingenuous:

'[T]he Jim Crow laws applied to *all* Negroes—not merely to the rowdy, or drunken, or surly, or ignorant ones. The new laws did not countenance the old conservative tendency to distinguish between classes of the race, to encourage the "better" element, and to draw it into a white alliance. Those laws backed up the Alabamian who told the disfranchising convention of his state that no Negro in the world was the equal of "the least, poorest, lowest-down white

man I ever knew." . . . The Jim Crow laws put the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected.

"The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. They were constantly pushing the Negro farther down.' C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW*, p. 93.

'All others can see and understand this. How can we properly shut our minds to it?' *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37. We see little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma. Such governmental denigration is a form of injury the Constitution recognizes and will protect against. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123.

"We have ventured to disclose our intuitions about issues hotly controverted by those social scientists professionally entitled to have opinions. We would think it corrosive of the judicial function were we to translate our amateur wisdom into constitutional imperatives. Fortunately, disposition of these cases does not require us to pursue such a ruinous course. Suffice it here to conclude that the constitutional doubts instantly generated by statutes drawing racial lines have not been allayed. We have never demanded proof that a Negro tried, or merely indicted, by a jury from which Negroes are systematically excluded was subjected to actual discrimination because of his race. Yet we have reversed criminal convictions prefaced by such racial exclusion ever since *Strauder v. West Virginia*, 100 U.S. 303. As there made plain, it was 'the apprehended existence of prejudice' by whites against Negroes that led to adoption of the equal protection clause. We are not persuaded that the prejudice apprehended by the framers does not infect the bluntly racial laws before us. Therefore they cannot be sustained.

"The 'separate but equal' doctrine announced in *Plessy v. Ferguson* was the product of sophistication. At an earlier day it was apparent to this Court that mere separation by reason of race was discriminatory. In 1873, in *Railroad Co. v. Brown*, 17 Wall. 445, this Court recognized that a federal statute of 1866 prohibiting a railroad from excluding persons 'on account of color,' was not met by the use of separate cars for Negroes. This Court read the statute as a direction 'that this discrimination must cease, and the colored and white races, in the use of the cars, be placed on an equality.' It was in such a natural sense that this Court first understood the generous ambit of the equal protection clause. 'What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?' *Strauder v. West Virginia*, *supra*, at 307. It is to this original understanding that we return.

"In support of what we deem to be the well-founded contention that governmentally imposed segregation carries with it a stigma directed at the segregated group, plaintiffs have placed great emphasis on the aggravated onus of segregation imposed in facilities—such as public schools here at issue—which the segregated group is *required* to utilize. We do not find it necessary to make a present determination whether segregation by law could be sustained in state facilities made available for the voluntary use of its citizens—public parks, for example. That case is not now before us. It may, however, be appropriate to observe that where facilities are voluntary the community's asserted need to ordain segregation seems even less weighty than in the cases before us: for under such circumstances those for whom racial mingling is obnoxious are under no obligation to attend. What deserves present mention, however, is that defendants likewise take comfort from the compulsory character of school attendance laws. This factor is said to constitute a special ground for sustaining state imposed segregation. We are told that invalidation of required segregation in public

schools arbitrarily elevates plaintiffs' claim of right not to be separated on racial lines above an equally weighty claim of right of others, both white and Negro, not to be compelled to mingle. But we think the contention fails. To the extent that implementation of this decision forces racial mingling on school children against their will, or against the will of their parents, this consequence follows because the community through its political processes has chosen and may continue to choose compulsory education—just as, from time to time, the nation has, through federal legislation, adopted the principle of coerced association implicit in a draft army. In neither instance can the coercion be said to emanate from this Court or from the Constitution. In any event, parents sufficiently disturbed at the prospect of having their children educated in democratic fashion in company with their peers are presumably entitled to fulfill their educational responsibilities in other ways. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510.

“Finally, we are warned that a departure from *Plessy v. Ferguson* will be accompanied by vast social unrest—that the principle of mandatory racial separation is so ingrained in southern life that relaxation of it will promote widespread discord between and within the races. Nevertheless, ‘important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.’ *Buchanan v. Warley*, 245 U.S. 60.

“Accordingly the judgments below, except for that in the Delaware case, must be reversed. But the form and timing of the mandates appropriate in these cases present problems of such magnitude that we will for the present withhold the entry of judgments and continue the cases on our docket to permit further argument relating to these procedural questions. . . .”

A draft opinion, prepared in hindsight by one who has no responsibility to decide, is only an academic exercise designed to prove a point. The fateful national consequences of *Brown v. Board of Education* flow from the opinion and judgment actually rendered. Professor Wechsler, sympathetic to the result but skeptical of the rationale, is frankly uncertain of history's verdict: “Who will be bold enough to say whether

the judgment in the segregation cases will be judged fifty years from now to have advanced the cause of brotherhood or to have illustrated Bagehot's dictum that the 'courage which strengthens an enemy, and which so loses, not only the present battle, but many after battles, is a heavy curse to men and nations'." ¹⁰² But some are bold enough—or fool-hardy enough—to make the prophecy Professor Wechsler eschews: the judgment in the segregation cases will as the decades pass give ever deeper meaning to our national life. It will endure as long as our Constitution and our democratic faith endure.

NEUTRAL PRINCIPLES AND RACIAL DISCRIMINATION

If the judgments in the covenant cases, the white primary cases, and the school cases are not supportable on the basis of neutral constitutional principles, they deserve to be jettisoned. Indeed, if the integrity of our judicial institutions means anything it means that irresponsible decisions will at last generally find their way to the oblivion of *Dred Scott*,¹⁰³ *Hammer v. Dagenhart*,¹⁰⁴ *United States v. Butler*¹⁰⁵ and comparable cases. Surely to conclude that bad decisions are as negotiable as good in democratic currency would be to rob of all significance the judicial authority and the judicial self-restraint so painfully and prayerfully developed.

The thesis articulated above is that neutral constitutional principles do sustain the three great groups of cases. But in any final assessment of these cases it cannot be too much stressed that the decisive constitutional principles here relevant are in a vital sense not neutral. The three post-Civil War Amendments were fashioned to one major end—an end to which we are only now making substantial strides—the full emancipation of the Negro:

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by

¹⁰² Wechsler, *Reflections on the Conference*, Col. L. Alumni Bull. Dec. 1958, p. 1, 2.

¹⁰³ *Scott v. Sandford*, 60 U.S. (19 How.) 691 (1857).

¹⁰⁴ 247 U.S. 251 (1918).

¹⁰⁵ 297 U.S. 1 (1936).

speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.

"We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." ¹⁰⁶

NEUTRAL PRINCIPLES AND THE JUDICIAL PROCESS

The central purpose of this paper has been to reappraise the several landmark cases in the field of race discrimination which Professor Wechsler has called into question. Intentionally, therefore, its principal focus has been upon those cases, not upon Professor Wechsler's insistence on the disposition of constitutional cases pursuant to neutral principles. It was hoped, indeed, that acquiescence in Professor Wechsler's thesis of neutrality would not only serve as an acceptable point of departure for study of the discrimination cases, but would also obviate controversy about jurisprudential issues which bear only tangentially on the cases themselves.

To accomplish this pacific purpose, the assumption was indulged that what Professor Wechsler chiefly seeks is a method of adjudication which is disinterested, reasoned, and comprehensive of the full range of like constitutional issues, coupled with a method of judicial exposition which plainly and fully articulates the real bases of decision. So stated, the proffered creed is hard to resist, and few are likely to be counted in opposition. To be sure, there may be no "positive law which binds the judges . . . to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before

¹⁰⁶ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873).

them. But the course hath prevailed from the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land." ¹⁰⁷

But perhaps this free-hand effort to intuit Professor Wechsler's meaning has been unfair. Perhaps, instead of fulfilling the purpose of seating everyone at the same jurisprudential table, all that has been done is to take Professor Wechsler's vintage wine and water it down to grape juice. If this is so, it was an act of hospitable ignorance, not of malice.

Unfortunately, it is not so easy to reverse the alchemy and reconstruct Professor Wechsler's true meaning. Very likely the idea of neutral constitutional adjudication does have implications broader than those notions of dispassionate judging which have here been ascribed to it. But if so, Professor Wechsler is best situated to illuminate the motto emblazoned on his flag. Short of that, it remains for this writer to state that the judicial neutrality he himself espouses does not preclude the disciplined exercise by a Supreme Court Justice of that Justice's individual and strongly held philosophy. Surely our Constitution is stronger because Cardozo—probing the "liberty" guaranteed by the fifth and fourteenth amendments—persuaded the Court that "freedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom." ¹⁰⁸ It would have been stronger still had the Court believed, with Brandeis, that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." ¹⁰⁹

If one is right in guessing that Professor Wechsler would not demur to the method by which Cardozo and Brandeis found constitutional equivalents for these deeply felt convictions, one is forced to speculate on what it is that makes their method palatable. Very likely Justice Frankfurter, who has thought long and deeply about constitutional adjudication, has put the matter best:

"In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of his-

¹⁰⁷ The language is Burke's in the *Report of the Committee of Managers on the Causes of the Duration of Mr. Hastings's Trial* in 4 SPEECHES OF EDMUND BURKE 200-01 (1816); it is quoted by Justice Frankfurter in a footnote to his opinion for the Court in *Rochin v. California*, 342 U.S. 165, 170 n.4 (1952). Actually there is a certain amount of "positive law" imposing on judges some obligation to explain their judgments. See, e.g., FED. R. CIV. P. 52(a); compare OHIO REV. CODE ANN. § 2503.20 (Page 1954), the predecessor of which caused the Supreme Court some confusion in *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 441-42 (1952).

¹⁰⁸ *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

¹⁰⁹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

tory, whereby a term gains technical content. . . . On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application. When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. . . . We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power."¹¹⁰

If Professor Wechsler means what Justice Frankfurter meant, the issue need not be pursued. But if Professor Wechsler's neutrality inhabits a more spacious domain, present efforts to capture and tame the concept are plainly unavailing. Suffice it to say, as Myres McDougal has recently said in another context,

"The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid fore-swearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal—logical—arrangement or to the external consequences of their application. It remains mysterious what criteria for decision a 'neutral' system could offer."¹¹¹

¹¹⁰ *Rochin v. California*, 342 U.S. 165, 169-72 (1952). See Freund, *Mr. Justice Frankfurter*, 26 U. CHI. L. REV. 205, 210, 214-15 (1959).

¹¹¹ McDougal, *Perspectives for an International Law of Human Dignity*, 1959 AM. SOC'Y INT'L L. PROCEEDINGS 107, 121 (1959).